

Talking Points

Pledge Protection Act of 2002 Opposing Arguments and Answers

Charge: This bill is an overreaction. The courts are already moving to fix this decision.

Answer: Although this decision rightly strikes most people as absurd, it did not come out of left field. There is significant support in the legal academy for it, and some Supreme Court cases can be read to imply a result like this. So another such ruling could come down ten years from now, when, perhaps, the consensus we now enjoy will no longer exist. If we are sure that the Pledge of Allegiance is constitutional, we ought to enshrine that principle in law.

Charge: This bill is an overreaction because it threatens our freedoms / our Constitution.

Answer: The bill is a remedy for cases in which the federal courts are themselves threatening the Constitution and our freedoms. Judicial review is a method of protecting our freedoms, but it can be abused if it is not checked. This is a constitutional check on such abuse. Furthermore, state courts and the Supreme Court will still maintain the power of judicial review.

Charge: It is up to the courts to interpret the Constitution, and it is wrong to second-guess them even if they occasionally make mistakes.

Answer: Congressmen, like the President and judges, take an oath to uphold the Constitution—not to uphold a court's possibly incorrect interpretation of the Constitution. That oath implies the possibility that in some cases when the Constitution conflicts with a court ruling, a conscientious congressman must work against that ruling precisely to vindicate the Constitution. This is one of those cases.

Charge: We are restricting the courts' power of judicial review, and this represents an affront to the idea of an independent judiciary:

Answer: We are only limiting the power of the federal courts to review such cases; state courts and the supreme court still maintain their power of judicial review. Also, the federal courts would continue to be able to exercise a wide range of judicial review, subject to this one tiny restriction. Congress would not be dictating the courts' decision

on any issue entrusted to their judgment—any such decision would be independent and uncoerced—but merely taking the Pledge of Allegiance out of their purview.

Charge: This bill will set a bad precedent, encouraging Congress to overturn sound judicial decisions in the future, if it dislikes those decisions.

Answer: Any constitutional power can be abused. That applies to the constitutional power of judicial review; it applies also to the Congress's constitutional power to limit abuses of judicial review by limiting the courts' jurisdiction. But the possibility of abuse is no reason to deny a branch of government one of its constitutional powers. It is a reason to use that power sparingly, responsibly, and following careful reflection. We can be confident that the power to limit the courts' jurisdiction would be used rarely. Historically, it has been used rarely. As a practical matter, Congress would have the majority support to pull jurisdiction only in the most egregious cases (like this one). This bill may deter courts from making frivolous rulings, and thus need to be used rarely.

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